



This document is scheduled to be published in the Federal Register on 02/28/2014 and available online at <http://federalregister.gov/a/2014-04159>, and on FDsys.gov

(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 212, 227, 237, and 252

RIN 0750-AH54

**Defense Federal Acquisition Regulation Supplement; Disclosure to
Litigation Support Contractors (DFARS Case 2012-D029)**

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Interim rule.

SUMMARY: DoD is amending the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement authority for DoD to
allow its litigation support contractors to have access to
"sensitive information," provided that the litigation support
contractor is subject to certain restrictions on using and
disclosing such information.

DATES: Effective [Insert date of publication in the Federal
Register]. Comment Date: Comments on the interim rule should
be submitted in writing to the address shown below on or before
[Insert date 60 days after date of publication in the FEDERAL
REGISTER], to be considered in the formation of a final rule.

ADDRESSES: You may submit comments, identified by DFARS Case
2012-D029, using any of the following methods:

Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inserting "DFARS Case 2012-D029" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2012-D029." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2012-D029" on your attached document. Follow the instructions for submitting comments.

E-mail: dfars@mail.mil. Include DFARS Case 2012-D029 in the subject line of the message.

Fax: 703-602-0350.

Mail: Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall,
703-602-0302.

SUPPLEMENTARY INFORMATION:

I. Background

Section 802 of the National Defense Authorization Act for Fiscal Year 2012 is a successor to section 801 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383), which amended 10 U.S.C. section 2320 to authorize DoD "covered litigation support contractors" to have access to and use of any technical, proprietary, or confidential data delivered under a contract for the sole purpose of providing litigation support. Section 802 amended 10 U.S.C. to add section 129d, repealed section 801 of the National Defense Authorization Act for Fiscal Year 2011, and expanded the basic coverage first established in section 801 to cover a significantly broader class of "sensitive information," which is defined as "confidential commercial, financial, or proprietary information, technical data, or other privileged information."

II. Discussion and Analysis

The basic objective of the rule is to expressly authorize DoD to provide its litigation support contractors with access to certain types of non-public information, provided that the litigation support contractors are required to protect that information from any unauthorized disclosure, and are prohibited from using that information for any purpose other than providing litigation support services to DoD.

New DFARS subpart 204.74, Disclosure of Information to Litigation Support Contractors, along with its associated new

clauses, provides the policy governing the new subpart in a two pronged implementation approach:

- DoD is authorized to release litigation information, including sensitive information, to its litigation support contractors provided that the litigation support contractors are subject to appropriate requirements and restrictions that comply with the requirements of 10 U.S.C. section 129d.
- Although not required by the statute, DoD will, to the maximum extent practicable, ensure that offerors and contractors submitting information to DoD under solicitations and contracts will be notified that the submitted information may be disclosed to DoD's litigation support contractors under the aforementioned conditions.

The new clause at 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors, is the mechanism through which the requirements and restrictions of 10 U.S.C. section 129d are applied to litigation support contractors. Furthermore, new DFARS clause 252.204-7015, Disclosure of Information to Litigation support Contractors, requires litigation support contractors to treat any and all information provided to, or obtained by, the litigation support contractor as sensitive information, regardless of whether that information is marked with a restrictive legend. While not

obviating the need, desire, or value of using restrictive legends on sensitive information, this approach ensures the protection of all sensitive information, even when inadvertent error or oversight results in a restrictive legend being omitted from the information.

The new solicitation provision at 252.204-7013, Limitations on the Use or Disclosure of Information by Litigation Support Solicitation Offerors, sets forth the same limitations and notifications in 252.204-7014 for litigation support solicitation offerors.

The new clause at 252.204-7015, Disclosure of Information to Litigation Support Contractors, implements the second of the two-prong policy approach by providing notice to all offerors and contractors that information they may submit to DoD may be disclosed to litigation support contractors. The notice clarifies that such releases to litigation support contractors are authorized notwithstanding any other provision of the contract. This notice is not required by the statute, nor is it otherwise required as a condition of DoD being authorized to make the disclosures covered by 10 U.S.C. section 129d. The notice is provided as a desired best practice when DoD will be receiving potentially sensitive information from its offerors or contractors, to ensure that the submitters are aware of this

potential, statutorily authorized release in connection with litigation support services.

The term "litigation information" is created to capture all information that is generated or obtained by the litigation support contractor in providing the litigation support services to DoD, including but not limited to sensitive information. The creation of the new term "litigation information" was particularly important for the implementation of this approach. The foundation of litigation support services is based in large part on the understanding that any or all information involved in providing these services must be treated as sensitive, official use only information, which cannot be shared with any unauthorized persons or used for any other purpose without careful review and approval by the appropriate Government officials.

To avoid any potential confusion regarding the application of requirements for "covered Government support contractors" to "litigation support contractors," a parenthetical exclusion of litigation support contractors from such requirements is added at: 227.7103-6(c) and 227.7203-6(d); and 252.227-7013(a)(5), 252.227-7014(a)(6), 252.227-7015(a)(2), and 252.227-7018(a)(6).

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

The objective of the rule is to implement authority for DoD to allow its litigation support contractors to have access to sensitive information, provided that the litigation support contractor is subject to certain restrictions on using and disclosing such information.

DoD does not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et

seq., because DoD activities using litigation support contractors are generally already using very restrictive nondisclosure agreements to govern any sensitive information that may be provided to, or developed or discovered by, the litigation support contractors in providing litigation support services for DoD. These DoD activities will likely review their current practices and make any necessary modifications to ensure that there are no inconsistencies with the new requirements. However, at this time DoD is unable to estimate the number of small entities to which this rule will apply. Therefore, DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2012-D029) in correspondence.

V. Paperwork Reduction Act

The rule contains no new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

VI. Determination to Issue an Interim Rule

A determination has been made under the authority of the

Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. Section 802 amends title 10, United States Code (U.S.C.), by adding section 129d to authorize an exception to the statutory scheme that would otherwise prohibit Government litigation support contractors from accessing or using sensitive information, defined as "confidential commercial, financial, or proprietary information, technical data, or other privileged information," belonging to prime contractors and other third parties, provided that the support contractor is subject to appropriate non-disclosure and use restrictions. Additionally, 10 U.S.C. 129d mandates specific restrictions for the litigation support contractors that will receive the sensitive information, to ensure that this use does not threaten the data owner's competitive advantage due to the proprietary information, and to provide the data owner with a legal remedies against the support contractor for any breach of those use restrictions. Failure to issue this rule as an interim rule will severely impact the Government's ability to obtain administrative, technical or professional services, including expert or technical consultation, in support of the Government during or in anticipation of litigation, thereby adversely affecting the Government's ability to successfully engage in legal proceedings. However, pursuant to 41 U.S.C.

1707 and FAR 1.501-3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 204, 212, 227, 237, and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System

Therefore, 48 CFR parts 204, 212, 227, 237, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 204, 212, 227, 237, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE MATTERS

2. Add subpart 204.74 to read as follows:

SUBPART 204.74—DISCLOSURE OF INFORMATION TO LITIGATION SUPPORT CONTRACTORS

Sec.

204.7400 Scope of subpart.

204.7401 Definitions.

204.7402 Policy.

204.7403 Solicitation provision and contract clauses.

SUBPART 204.74—DISCLOSURE OF INFORMATION TO LITIGATION SUPPORT CONTRACTORS

204.7400 Scope of subpart.

This subpart prescribes policies and procedures for the release and safeguarding of information to litigation support contractors. It implements the requirements at 10 U.S.C. 129d.

204.7401 Definitions.

"Litigation support," "litigation support contractor," and "sensitive information," as used in this subpart, are defined in the clause at 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors.

204.7402 Policy.

(a) Any release or disclosure of litigation information that includes sensitive information to a litigation support contractor, and the litigation support contractor's use and handling of such information, shall comply with the requirements of 10 U.S.C. 129d.

(b) To the maximum extent practicable, DoD will provide notice to an offeror or contractor submitting, delivering, or otherwise providing information to DoD in connection with an offer or performance of a contract that such information may be released or disclosed to litigation support contractors.

204.7403 Solicitation provision and contract clauses.

(a) Use the provision at 252.204-7013, Limitations on the Use or Disclosure of Information by Litigation Support Solicitation Offerors, in all solicitations, including solicitations using

FAR part 12 procedures for the acquisition of commercial items, that involve litigation support services.

(b) Use the clause at 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that involve litigation support services.

(c) Use the clause at 252.204-7015, Disclosure of Information to Litigation Support Contractors, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that involve litigation support services and do not include the clause at 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 212.301 by—

a. Redesignating paragraphs (f)(vii) through (lxvii) as (f)(x) through (lxx); and

b. Adding new paragraphs (f)(vii), viii), and (ix) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(vii) Use the provision at 252.204-7013, Limitations on the Use or Disclosure of Information by Litigation Support Solicitation Offerors, as prescribed in 204.7403(a), to comply with 10 U.S.C. 129d.

(viii) Use the clause at 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors, as prescribed in 204.7403(b), to comply with 10 U.S.C. 129d.

(ix) Use the clause at 252.204-7015, Disclosure of Information to Litigation Support Contractors, as prescribed in 204.7403(c), to comply with 10 U.S.C. 129d.

* * * * *

PART 227—PATENTS, DATA, AND COPYRIGHTS

4. In section 227.7100, revise paragraph (b) to read as follows:

227.7100 Scope of subpart.

* * * * *

(b) Does not apply to—

(1) Computer software or technical data that is computer software documentation (see subpart 227.72); or

(2) Releases of technical data to litigation support contractors (see subpart 204.74).

227.7103-6 [Amended]

5. Amend section 227.7103-6 by removing the phrase "Government will provide the contractor," and adding in its place "Government will provide the contractor (other than a litigation support contractor covered by 252.204-7014),".

6. In section 227.7200, revise paragraph (b) to read as follows:

227.7200 Scope of subpart.

* * * * *

(b) Does not apply to—

(1) Computer software or computer software documentation acquired under GSA schedule contracts; or

(2) Releases of computer software or computer software documentation to litigation support contractors (see subpart 204.74).

227.7203-6 [Amended]

7. Section 227.7203-6 is amended by removing the phrase "Government will provide the contractor," and adding in its place "Government will provide the contractor (other than a litigation support contractor covered by 252.204-7014),".

PART 237—SERVICE CONTRACTING

8. Add section 237.174 to read as follows:

237.174 Disclosure of information to litigation support contractors.

See 204.74 for disclosure of information to litigation support contractors.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Add section 252.204-7013 to read as follows:

252.204-7013 Limitations on the Use or Disclosure of Information by Litigation Support Solicitation Offerors.

As prescribed in 204.7403(a), use the following provision. If the solicitation is a request for quotations, the terms "quotation" and "Quoter" may be substituted for "offer" and "Offeror".

LIMITATIONS ON THE USE OR DISCLOSURE OF INFORMATION BY LITIGATION SUPPORT SOLICITATION OFFERORS (FEB 2014)

(a) Definitions. As used in this provision:

Computer software, litigation information, litigation support, sensitive information, and technical data, are defined in the clause at DFARS 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors.

(b) Limitations on use or disclosure of litigation information.

Notwithstanding any other provision of this solicitation, by submission of its offer, the Offeror agrees and acknowledges—

(1) That all litigation information will be accessed and used for the sole purpose of providing litigation support;

(2) That the Offeror will take all precautions necessary to prevent unauthorized disclosure of litigation information; and

(3) That litigation information shall not be used by the Offeror to compete against a third party for Government or nongovernment contracts.

(c) Indemnification and creation of third party beneficiary rights. By submission of its offer, the Offeror agrees—

(1) To indemnify and hold harmless the Government, its agents, and employees from any claim or liability, including attorneys' fees, court costs, and expenses, arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of any litigation information; and

(2) That any third party holding proprietary rights or any other legally protectable interest in any litigation information, in addition to any other rights it may have, is a third party beneficiary who shall have a right of direct action against the Offeror, and against any person to whom the Offeror has released or disclosed such data or software, for the unauthorized duplication, release, or disclosure of such information.

(d) Offeror employees. By submission of its offer, the Offeror agrees to ensure that its employees are subject to use and nondisclosure obligations consistent with this provision prior to the employees being provided access to or use of any litigation information covered by this provision.

(End of provision)

10. Add section 252.204-7014 to read as follows:

**252.204-7014 Limitations on the Use or Disclosure of Information
by Litigation Support Contractors.**

As prescribed in 204.7403(b), use the following clause:

**LIMITATIONS ON THE USE OR DISCLOSURE OF INFORMATION BY LITIGATION
SUPPORT CONTRACTORS (FEB 2014)**

(a) Definitions. As used in this clause:

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

Litigation information means any information, including sensitive information, that is furnished to the contractor by or on behalf of the Government, or that is generated or obtained by the contractor in the performance of litigation support work under this contract.

Litigation support means administrative, technical, or professional services provided in support of the Government during or in anticipation of litigation.

Litigation support contractor means a contractor (including an expert or technical consultant) providing litigation support under

a contract with the Department of Defense that contains this clause.

Sensitive information means confidential information of a commercial, financial, proprietary, or privileged nature. The term includes technical data and computer software, but does not include information that is lawfully, publicly available without restriction.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(b) Limitations on use or disclosure of litigation information.

Notwithstanding any other provision of this contract, the Contractor agrees and acknowledges—

(1) That all litigation information will be accessed and used for the sole purpose of providing litigation support;

(2) That the Contractor will take all precautions necessary to prevent unauthorized disclosure of litigation information;

(3) That litigation information shall not be used by the Contractor to compete against a third party for Government or nongovernment contracts; and

(4) That violation of paragraph (b) (1), (b) (2), or (b) (3), of this section, is a basis for the Government to terminate this contract.

(c) Indemnification and creation of third party beneficiary rights. The Contractor agrees—

(1) To indemnify and hold harmless the Government, its agents, and employees from any claim or liability, including attorneys' fees, court costs, and expenses, arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of any litigation information; and

(2) That any third party holding proprietary rights or any other legally protectable interest in any litigation information, in addition to any other rights it may have, is a third party beneficiary under this contract who shall have a right of direct action against the Contractor, and against any person to whom the Contractor has released or disclosed such data or software, for the unauthorized duplication, release, or disclosure of such information.

(d) Contractor employees. The Contractor shall ensure that its employees are subject to use and nondisclosure obligations consistent with this clause prior to the employees being provided access to or use of any litigation information covered by this clause.

(e) Flowdown. Include the substance of this clause, including this paragraph (e), in all subcontracts, including subcontracts for commercial items.

(End of clause)

11. Add section 252.204-7015 to read as follows:

252.204-7015 Disclosure of Information to Litigation Support Contractors.

As prescribed in 204.7403(c), use the following clause:

DISCLOSURE OF INFORMATION TO LITIGATION SUPPORT CONTRACTORS (FEB 2014)

(a) Definitions. As used in this clause:

Litigation support means administrative, technical, or professional services provided in support of the Government during or in anticipation of litigation.

Litigation support contractor means a contractor (including an expert or technical consultant) providing litigation support under a contract with the Department of Defense that contains this clause.

Sensitive information means confidential information of a commercial, financial, proprietary, or privileged nature. The term includes technical data and computer software, but does not include information that is lawfully, publicly available without restriction.

(b) Authorized disclosure. Notwithstanding any other provision of this solicitation or contract, the Government may disclose to a litigation support contractor, for the sole purpose of litigation support activities, any information, including sensitive information, received--

(1) Within or in connection with a quotation or offer; or

(2) In the performance of or in connection with a contract.

(c) Flowdown. Include the substance of this clause, including this paragraph (c), in all subcontracts, including subcontracts for commercial items.

(End of clause)

252.227-7013 [Amended]

12. Amend section 252.227-7013 by--

a. Removing the clause date (JUN 2013) and adding in its place (FEB 2014); and

b. In paragraph (a)(5), removing the phrase "Covered Government support contractor means a contractor" and adding in its place "Covered Government support contractor means a contractor (other than a litigation support contractor covered by 252.204-7014)".

252.227-7014 [Amended]

13. Amend section 252.227-7014 by--

a. Removing the clause date (MAY 2013) and adding in its place (FEB 2014); and

b. In paragraph (a)(6), removing the phrase "Covered Government support contractor means a contractor" and adding in its place "Covered Government support contractor means a contractor (other than a litigation support contractor covered by 252.204-7014)".

252.227-7015 [Amended]

14. Amend section 252.227-7015 by—

a. Removing the clause date (JUN 2013) and adding in its place (FEB 2014); and

b. In paragraph (a)(2), removing the phrase "Covered Government support contractor means a contractor" and adding in its place "Covered Government support contractor means a contractor (other than a litigation support contractor covered by 252.204-7014)".

252.227-7018 [Amended]

15. Amend section 252.227-7018 by—

a. Removing the clause date (MAY 2013) and adding in its place (FEB 2014); and

b. In paragraph (a)(6), removing the phrase "Covered Government support contractor means a contractor" and adding in its place "Covered Government support contractor means a contractor (other than a litigation support contractor covered by 252.204-7014)".

[FR Doc. 2014-04159 Filed 02/27/2014 at 8:45 am; Publication
Date: 02/28/2014]